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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. HENRY JAMES FLUKER, Defendant and Appellant.	C061424 (Super. Ct. No. 08-5714)

A jury convicted defendant of five sexual offenses against the victim, a girl aged 17 with the mental age of between 9 and 12, and defendant admitted service of a prior prison term. (Pen. Code, §§ 261.5, subd. (c) (three counts); 288a, subd. (b)(1) (two counts); 667.5, subd. (b).) The trial court sentenced defendant to prison for five years eight months. Defendant timely filed this appeal.

On appeal, defendant contends the trial court mishandled its review of the victim's juvenile court records, misinstructed

the jury on the need to agree unanimously as to two counts, and failed to award the correct amount of presentence credits.

We shall modify the judgment to award defendant additional presentence credits, but otherwise affirm.

BACKGROUND

Defendant was charged with 10 sex crimes committed against the same victim, and it was alleged he had served a prior prison term. Prior to jury selection, defendant admitted the prior prison term allegation. After the first jury deadlocked and a mistrial was declared, the People filed an amended information that dismissed charges of sexual abuse of a mentally incapacitated person.

Before the second jury heard any evidence, defendant again admitted the prior prison term.

Leslie Scott, a social worker, testified that she met the victim in May 2008, and removed the victim from her mother's home in August 2008. The victim had mild mental retardation and had a mental age of between 9 and 12 years. From early June to the end of July 2008, the victim was a runaway. When Scott picked the victim up from a receiving home in late July 2008, the victim told Scott she had been with defendant, her boyfriend, living a transient lifestyle by the river.

In October 2008, the victim ran away from her foster placement. In mid-October 2008, Scott received a call reporting the victim's location, and that the victim was with defendant, but by the time the police arrived, defendant had left. The victim told Scott that after leaving the foster placement, she

and defendant lived in an abandoned house and had sex "at least" every other night.

A peace officer testified that on July 30, 2008, she found defendant in the victim's company, and defendant told the officer the victim was 17.

The victim testified she turned 18 a couple of weeks before trial, and was born in 1991. She met defendant near the Greyhound bus station in Sacramento when she asked him for a cigarette and he asked how old she was. She saw him another day and he gave her his phone number. She called him another day and arranged to meet him at the K Street Mall. She and her sister met defendant and his friend Jamal and "got a motel" in West Sacramento. She had told him she was 18, but was sure she had also told him she was 17, and he said she looked younger than that, "between 15 and 16." She and defendant had intercourse at the motel that night. She saw defendant several more times after that, and for a while she did not go home, but stayed with defendant by the water, and she viewed him as her boyfriend because "he was a lot of fun" and they had sex. Once he put his mouth on her vagina during this time.

She did not like her foster placement in the "Olivehurst, Marysville area," and called defendant to see if he could get her out. One day he picked her up from Lindhurst High School and brought her back to Sacramento by Greyhound bus. They stayed in an abandoned house in West Sacramento. They had intercourse there "about three or four times" and she touched his penis with her mouth more than once, and testified that she

had oral sex with him on the first and last nights they were in the abandoned house. On cross examination she said she had oral sex with him "maybe" 15 times and intercourse about the same number of times. She said defendant told her that he had a problem with his penis and that sometimes it hurt him to have intercourse, so she would put her mouth on his penis or use her hand on his penis.

The victim's sister testified the victim and defendant had sex on the bed in the motel room, and the next day the victim told her they were lovers and had sex.

The victim's mother testified defendant said he was going to get an apartment so he could live with the victim.

A peace officer spoke with the victim in early August 2008, and she said she had sex with defendant about six times, five times by the river and once at the motel.

A detective interviewed the victim, who reported that she had sexual intercourse with defendant at the motel and at the abandoned house, and that she orally copulated defendant more than once, and that defendant orally copulated her more than once in the abandoned house.

Defendant testified he never had any kind of sexual relations with the victim. He testified that she told him she was 18. He admitted they stayed at a motel one night, and that she essentially lived with him for a period after that, and that he brought her back from Lindhurst High School to Sacramento. But he testified that all those times they spent overnight together, he never tried to have sex with her. He admitted he

called the victim his fiancé, was attracted to her, and had proposed to her. He also testified they talked about having sex and about getting married, and he told her they had to wait until she turned 18, showing he knew her true age. He testified that because of an uncorrected defect in the placement of his urethra—hypospadias, sex was painful for him, and he told her he would need an operation before they had sex. He admitted to two felony convictions.

In rebuttal, a urologist testified hypospadias does not cause pain or interfere with intercourse, although it can interfere with a man's reproductive capability, depending on where the urethral opening lies.

The second jury convicted defendant of three counts of unlawful sexual intercourse with a minor more than three years younger than the perpetrator, and two counts of unlawful oral copulation, as charged. (Pen. Code, §§ 261.5, subd. (c), 288a, subd. (b)(1).)

The trial court sentenced defendant to prison for five years eight months. Defendant timely filed this appeal.

DISCUSSION

I. Juvenile Court Records

The juvenile court granted a defense request for an order permitting the trial court to review the victim's and her sister's juvenile records to see if they contained discoverable information. The trial court proposed to review the material in chambers informally, and report to counsel what was found, and defense counsel said "That's fine." The court retired to

chambers with the minors' dependency counsel and the social worker to review the file.

When the court returned, it announced as follows:

"[The social worker has] had this case for some time and is familiar with both minors' intimate -- I don't want to say intimate. She knows them both well and knows the case well. It's been her case for some time.

"Obviously when you look at the file I cannot physically personally read every sentence and every page, so I have questioned her about is she aware of any comments that either [the victim or her sister] have made to her about the subjects we've talked about, and she said, no.

"She has talked to both of them about being careful and safe sex and -- in general but has not asked either about the other's conduct because she knew there was a criminal case pending --

"MR. SPANGLER [Defense counsel]: Ah.

"THE COURT: -- and so she assured me there's nothing in the file that would point one way or another, but she did talk to them about being careful and safe sex and what they shouldn't do and so forth but did not ask them about any conduct or actions, so there's apparently nothing there.

"MR. SPANGLER: Thank you very much, your Honor.

"Thank you very much, ma'am."

On appeal, defendant faults the trial court's procedure for reviewing the records, because the trial court relied on the

social worker to identify which portions of the records the trial court should review.

However, defendant's trial counsel acquiesced in the trial court's procedure, and therefore the claim of error has not been preserved. (See *People v. French* (2008) 43 Cal.4th 36, 46.)

In any event, we have reviewed the juvenile court records, as appellate counsel suggested, and we see nothing disclosable in those records. Therefore, any procedural error by the trial court was harmless.

II. Claimed Unanimity Problem

Defendant contends the trial court's unanimity instruction was flawed. We agree, but the error was harmless.

As to the two oral copulation counts, the prosecutor stated during argument as follows: "And [counts 4 and 5] are both oral copulation with a person who is under 18, and they are both charged for the same dates June 1st through October 14th, 2008. And the testimony relating to those two charges is that [the victim] said that she placed her mouth on Mr. Fluker's penis the two times, the first time and the last time that she stayed at the abandoned house in West Sacramento."

The amended information alleged two counts of oral copulation between June 1, 2008 and October 14, 2008, as the prosecutor stated in argument.

However, there was a mistake about the date in the written pattern unanimity instruction. (CALCRIM No. 3500.) That instruction described the oral copulation counts as occurring "some time during the period of 6/1/08 through 7/31/08. [¶]

The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed."

Unfortunately, the court reporter did not transcribe the oral jury instructions, so we do not know whether the court corrected the date error when this instruction was read to the jury.

This is not a true unanimity problem, as defendant characterizes it. The jury was correctly instructed that the jurors had to agree on "which act" defendant committed for each count, and the prosecutor properly elected two specific acts to support those two counts, referring the jury to the victim's testimony about those two specific acts. The amended information, which contained the time span as between June 1, 2008, and October 14, 2008, was read to the jury. There is no reason any rational jurors would seize on the incorrect dates in the unanimity instruction in voting for a guilty verdict. Most importantly, the defense theory was that defendant never had any sexual contact with the victim, and the jury credited the victim, showing that any error in the wording of the unanimity instruction was harmless. (See *People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)

III. Presentence Conduct Credits

Defendant contends that recent amendments to Penal Code section 4019 apply retroactively to his case, entitling him to

additional presentence conduct credits. (See Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) We agree. Because this appeal was pending as of the effective date of the new formula, he is entitled to its benefit. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment applies to acts committed before its passage provided the conviction is not final]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying *Estrada* to amendment allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits].)

The trial court awarded defendant credit for 152 actual and 76 conduct days. None of defendant's prior convictions disqualify him from the new formula, and the trial court did not order him to register as a sex offender, which also would have disqualified him. (Pen. Code, § 4019, subds. (b)(2) & (c)(2).) Defendant is entitled to 152 days of conduct credit, instead of the 76 awarded by application of the prior formula. We modify the judgment to award defendant 152 days of actual presentence credit and 152 days of presentence conduct credit.

DISPOSITION

The judgment is affirmed as modified by this opinion. The trial court is directed to prepare and forward a new abstract of judgment to the Department of Corrections and Rehabilitation.

HULL, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.